RECENT DEVELOPMENTS

REMOVAL FROM STATE TO FEDERAL COURT UNDER THE COLOR OF AUTHORITY PROVISION

New York v. Galamison
342 F.2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965)

The Rev. Milton A. Galamison and nearly sixty other civil rights demonstrators were protesting alleged nationwide discriminatory treatment of Negroes. The State of New York prosecuted them for these acts which interrupted subway and highway traffic to the New York World's Fair[1] and the defendants filed petitions to remove under the Civil Rights Removal Statute.[2] Essentially, the defendants asserted that their acts of protest and resistance were

> "under color of authority" of one or more of three "law[s] providing for equal rights"—the guarantees of free speech and petition embodied in the due process clause of the Fourteenth Amendment, the equal protection clause of that amendment, and statutory protection of rights conferred by the Constitution, notably 42 U.S.C. §§ 1981 and 1983.[3]

As an alternative defendants argued that their refusal to comply with police orders was " 'on the ground that it would be inconsistent with' the same three sets of laws."[4] The State moved to remand in each case and the respective district courts granted the motions. The court of appeals, after preliminarily deciding that such remand orders are appealable,[5] treated the

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[1] For detailed accounts of the events preceding and subsequent to the arrests, see N.Y. Times, April 19-29, 1964.

[2] 28 U.S.C. § 1443 (1948) Civil Rights Removal:
Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

[3] New York v. Galamison, 342 F.2d 255, 258 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965).

[4] *Ibid.*

[5] New York v. Galamison, *supra* note 3, at 257. Generally an order by a district court remanding a case to a state court is not reviewable on appeal. 28 U.S.C. § 1447(d) (1948) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The interlocutory nature of such an order and the time lost in reviewing such orders are the main reasons underlying the

various cases as one and affirmed,[6] holding that the color of authority provision[7] did not apply because neither a generalized constitutional provision nor a statute allowing for civil claims for deprivation of civil rights are laws conferring color of authority within the meaning of the provision.

Although the question of who may invoke the color of authority provision was discussed, the court of appeals did not answer it[8] as another ground was dispositive of the appeal.[9] Notwithstanding the other ground, the issue as to *who* may remove under the provision would seem of equal importance and logically should be decided first. For if the removing defendant is an improper party under the provision's coverage, then needless to say, there is no reason to consider the source of the alleged color of authority. Since there have been no significant substantive changes in the provision since its enactment in 1866,[10] the original statutory policy is still valid in determining those individuals intended to be covered.

Section 1443(a), the color of authority provision, had its origin in section 3 of the Civil Rights Act of 1866.[11] This section was patterned after section 5 of the Habeas Corpus Act of 1863,[12] which was aimed at providing an opportunity to remove for federal officers and their agents. The removal provisions were reenacted in subsequent years retaining substantially the same

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statutory prohibition. Wright, Federal Courts 126 (1963). However, Congress in enacting § 901 of the Civil Rights Act of 1964 intended to permit review of such orders where removal is sought pursuant to the provisions of the Civil Rights Removal Statute. 28 U.S.C. § 1443 (1964). Section 901 of the Civil Rights Removal Statute, 78 Stat. 241, 267 (1964), reads as follows: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." Notwithstanding the enactment of § 901, Congress failed, inadvertently, to amend 28 U.S.C. § 1292 which confers appellate jurisdiction to courts of appeal on specific interlocutory orders. Hence it is arguable that a court of appeals is still powerless to review remand orders since § 1292 delimits the types of interlocutory orders reviewable. The court in the principal case, however, was strongly influenced by the clear expression of congressional intent, and reading the two sections *in pari materia* treated § 901 as amending § 1292. New York v. Galamison, *supra* note 3, at 257; 2 Sutherland, Statutory Construction 541 (1943).

[6] New York v. Galamison, *supra* note 3.

[7] For the purposes of this note § 1443(1) of title 28 of the U.S.C. will be referred to as the denial provision and § 1443(2) will be referred to as the color of authority provision.

[8] New York v. Galamison, *supra* note 3, at 263.

[9] For discussion of this other ground, see text accompanying note 21 *infra*.

[10] For a general history of the Act, see Divan & Fiedler, "The Federal Statutes—Their History and Use," 22 Minn. L. Rev. 1008 (1938); Morse, "Civil Rights Removal: The Letter Killeth, But the Spirit Giveth Life," 11 How. L.J. 149 (1965).

[11] 14 Stat. 27 (1866). The pertinent part of this statute is reproduced in the text accompanying note 16 *infra*.

[12] 12 Stat. 755 (1863).

import and phraseology.[13] In 1948, when the provisions became sections 1443(1) and 1443(2) of title 28 of the U.S.C. the words "any officer, civil or military or other person" were deleted from the color of authority provision. Although, as the reviser's note indicates,[14] this phraseology change was not intended to change the substance of the provision, it clearly focused attention on the scope and availability of the provision to a removing defendant.

The original color of authority provision in the Civil Rights Act of 1866[15] allowed removal of suits

> against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the Relief of Freedmen . . . .[16]

Section 1 of the Civil Rights Act of 1866 gave the newly emancipated Negro all civil rights consistent with citizenship. Section 2 made it a crime to deprive persons of rights provided by the act. Following the removal provisions (section 3), sections 4-10 were concerned with the arrest and prosecution of persons committing the crimes defined in section 2. In section 5, federal commissioners were authorized to appoint "suitable persons" to serve warrants and permitted those appointees to "summon or call to their aid the bystanders or posse comitatus." This portion of section 5, when read in conjunction with the removal provisions and specifically the color of authority provision, provides strong indicia that "other person" in the color of authority provision was meant to refer to those individuals in the categories enumerated in section 5: those acting on behalf of federal officers in a quasi-official capacity. If Congress had intended to include within section 1443(2) all individuals, it could have used as it did in section 1443(1)—the denial clause—the words "any person" instead of the less inclusive "officer . . . or other person." A broader reading of the provision would not be consistent with the statutory interpretation doctrine of *ejusdem generis*.

Perhaps the strongest reason for limiting the coverage of the provision to federal officers and those acting on their behalf, is that such an interpretation is peculiarly consistent with the purpose of the Act and the conditions that brought it about. The Civil Rights Act of 1866 was enacted to provide the Negro with all the rights of citizenship and to insure the realization of these rights via federal enforcement and protection.[17] Where state statutes or

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[13] See note 10 *supra*.

[14] New York v. Galamison, *supra* note 3, at 263.

[15] See note 11 *supra*.

[16] *Ibid.*

[17] "The primary purpose of this statute was to protect the members of the colored race in the civil rights conferred upon them by the post Civil War amendments to the federal Constitution (particularly the Fourteenth Amendment) and by the acts of Congress passed in pursuance of these amendments. But the language of the statute is much broader than this purpose, so that it applies to other state deprivation of civil rights not involving the colored race." Dobie, Federal Procedure 390 (1928).

constitutions denied the Negro of these rights and the Negro sought to challenge the validity of these laws, Congress (obviously apprehensive of the lack of impartiality that existed in some state courts) gave the Negro the opportunity to remove. As a counterpart to the denial provision, the color of authority provision gave federal officers and their agents the same opportunity when they were arrested or prosecuted in attempting to enforce the provisions of the Act and to secure to the Negro his rights.[18]

With the relatively recent proliferation of civil rights litigation, coupled with the unavailability of review of remand orders until the Civil Rights Act of 1964,[19] there understandably has been little interpretation of the color of authority provision. In fact most litigation has involved the denial clause. In addition, the legislative history behind section 901 of the Civil Rights Act of 1964,[20] which permitted review of remand orders involving sections 1443(1) and 1443(2), indicates that Congress was mainly concerned with the cases leading up to *Kentucky v. Powers*[21] which held that removal under the denial clause could only be obtained when a state constitutional provision or statute prevented a defendant from exercising his civil rights. These decisions involved predecessors of section 1443(1)—the denial provision—and not 1443(2)—the color of authority provision. Hence there is nothing to indicate that Congress was concerned about the latter section. Finally, two recent cases have taken the view that 1443(a) is limited solely to those individuals acting in an official or quasi-official capacity.[22]

If this is the correct interpretation of who may invoke section 1443(2), then it would be necessary for an individual seeking to remove to demonstrate at least a quasi-official capacity derived from a law providing for equal rights. What in fact will constitute a quasi-official status for purposes of the provision may give the courts some opportunity to broaden the coverage of the provision. However, if read in the light of the original purpose of the Civil Rights Act of 1866, the concept of quasi-official would seem to be specifically delimited to police-type enforcement behavior.

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18 "The legislative sentiment of those supporting this act [Civil Rights Act of 1866] likewise was to abate the fear that local hostilities and prejudice would operate in the local state courts to the detriment of Union soldiers, judges, administrators and other Union officials." Morse, "Civil Rights Removal: The Letter Killeth, But the Spirit Giveth Life," *supra* note 10, at 153.

19 78 Stat. 241 (1964).

20 H.R. Rep. No. 974, 88th Cong., 2d Sess. (1963); 110 Cong. Rec. 6739 (daily ed. April 6, 1964) (remarks by Senator Dodd).

21 201 U.S. 1 (1906).

22 In Peacock v. City of Greenwood, 347 F.2d 679 (5th Cir. 1965), sit-in demonstrators were not allowed to invoke 1443(2) because they did not have the requisite official or quasi-official capacity, but were allowed to remove under 1443(1) since they had alleged that a state statute was applied so as to deprive them of their equal rights. Similarly, in City of Clarksdale v. Gertge, 237 F. Supp. 213 (N.D. Miss. 1964), the court stated at 220 in disposing of defendant's claim: "[R]emoval is not available under subsection (2) [1443(2)] unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights."

The basis for affirming the remand orders in *Galamison* was that the defendants' alleged source of "color of authority" (the fourteenth amendment and 42 U.S.C. § 1981 and 1983) was not sufficient for 1443(2). The court held that a removing defendant under 1443(2)

> must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him.[23]

This interpretation by the *Galamison* court is entirely consistent with the proposition that the provision is only available to federal officers and their agents.

However, irrespective of who may invoke the statute, it seems clear that the *Galamison* formulation of what is a "law providing for equal rights" within the context of the provision, is correct. When the provision was enacted in 1866, the derivation of color of authority was delimited to the Civil Rights Act of 1866 and "the act establishing a Bureau for the relief of Freedmen and Refugees . . . ." When section 3—the removal section—of the 1866 Act was reenacted in 1875, it was placed in a distinct title, "The Judiciary" (title XIII, section 641) and the source of color of authority was changed to read "derived from any law providing for equal rights." Clearly this change could not have been intended to open the door for removal where general constitutional rights were concerned. The more reasonable interpretation would be that the 1875 revisers were concerned with specific laws founded in egalitarian terms,[24] such as enumerated in section 3 of the Civil Rights Act of 1866.[25] In fact, this same Reconstruction Congress demonstrated its awareness of the distinction between specific laws dealing with civil rights and the general rights secured by the Constitution when it separated the two in what is now section 1343(3), title 28 of U.S.C., which gives circuit courts original jurisdiction of suits for deprivation under the auspices of state authority "of any right privilege or immunity, secured by the Constitution of the United States, or any right secured by any law providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."[26]

In *Gibson v. Mississippi*[27] where removal had been sought under the denial clause, it was claimed that a statute providing for the organization of the grand jury was *ex post facto* as to the defendant. The Court held that this was a *constitutional issue* and could not be raised under the civil rights removal section. The inference to be drawn is that constitutional issues are separate and distinct from those equal rights laws intended to be embodied in the statute. The Courts' holding encompassed the color of authority provision as well as the denial clause. The more recent *Galamison* interpretation was

23 New York v. Galamison, *supra* note 3, at 264.

24 *Id.* at 268.

25 See text accompanying note 16 *supra.*

26 28 U.S.C. § 1343(3) (1964).

27 162 U.S. 565 (1896).

followed in *Peacock v. City of Greenwood*,[28] where the court refused to find "color of authority" for removal purposes when the defendant merely alleged the exercise of an equal civil right under the Constitution or laws of the United States. In *Forman v. City of Montgomery*,[29] the court held that a valid defense to a crime for which a defendant is charged is not enough to confer color of authority, rather a defendant must show a source which gives positive sanction to his behavior. There appear to be no decisions contrary to *Galamison* on this issue.

The conclusions reached so far, namely that the color of authority provision is limited solely to federal officers and those acting in a quasi-official capacity and, as to these individuals, they must derive such authority from a specific law founded in egalitarian terms, would seem to suggest that as to the defendants in this case and similar demonstrators, the color of authority provision is dead. The simple answer to such a logical inference, is that, as to them, the color of authority provision was never alive.

Clearly the Congress in 1866 could not have anticipated the civil rights revolution along with its attendant legal problems we are experiencing today. Congress obviously felt that the removal opportunity under the denial clause would be sufficient to protect the rights of the Negro. It is not clear, however, that the denial clause is insufficient today in spite of the increase in litigation. The defendants in *Galamison*, for example, disclaimed any reliance on the denial clause,[30] which may be invoked by "any" person. This was apparently due to the fact that they could not allege the basis for removal under 1443(1), namely, that the trespass laws of New York were being enforced in a discriminatory manner.[31] If these defendants were not being discriminated against by state laws or their enforcement, then the danger Congress sought to obviate by allowing removal, is not present and neither is the necessity for removal. Simply stated the defendants were being prosecuted in a non-discriminatory manner under non-discriminatory laws. If they had alleged[32] that the trespass statutes were discriminatory, as did the successful removing defendant in *Rachel v. Georgia*,[33] they could have removed under the denial clause. The purpose of removal was stated in *Strauder v. West Virginia*:[34]

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[28] See note 22 *supra*.

[29] 245 F. Supp. 17 (N.D. Ala. 1965). See also Board of Educ. v. City-Wide Comm. for Integration, 342 F.2d 284 (2d Cir. 1965).

[30] New York v. Galamison, *supra* note 3, at 258.

[31] Under the formulation in Kentucky v. Powers, *supra* note 21, at 26, a defendant seeking removal under the denial clause must allege that a denial of the rights arose from some state "law, statute, ordinance, regulation or custom."

[32] The Galamison court held that "a defendant seeking removal under that section [§ 1443] does not have to prove preliminarily that he will prevail." New York v. Galamison, *supra* note 3, at 261-62.

[33] 342 F.2d 336 (5th Cir. 1965). The court held that defendants, having been arrested for violations of a Georgia anti-trespass statute, sufficiently alleged denial of equal rights by asserting that requests to leave premises had been based on a policy of racial discrimination in violation of the Civil Rights Act of 1964.

[34] 100 U.S. 303 (1879).

> A right or an immunity, whether enacted by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress .... And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is being denied by the State law into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sec. 641 [now section 1443(1)] is such a provision.[35]

The denial clause as indicated by the court is clearly consistent with the purpose of removal and even today is adequate to effectuate the intention of Congress to protect citizens from discriminatory state legislation and action.

The prognosis for removal under the color of authority provision is very limited. Conceivably it may experience greater use as more federal legislation is passed which provides for federal officers to assist in securing and protecting the rights of citizens. For example, a federal registrar acting pursuant to the Voting Rights Act of 1965,[36] who is arrested by the state for such behavior, would clearly come within the provision. It appears that the color of authority provision is limited to this and similar situations. This conclusion is reinforced by the fact that the denial clause is adequate to protect against discriminatory state laws and practices. If removal is to be judicially expanded, it would be more feasible via the denial clause, since any person may invoke it and what constitutes denial by a state is acquiring a broader definition.[37] Finally, the alternative of legislative amendment is always available to Congress if it feels that the existing provisions are not adequate nor desirable to accomodate the "rage to remove."[38]

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[35] *Id.* at 310.

[36] 79 Stat. 437 (1965).

[37] For example, it has been suggested that the Supreme Court today would acknowledge the right to removal under § 1443(1) even where no legislative denial of rights is shown. See Krieger, "Local Prejudice and Removal of Criminal Cases From State to Federal Courts," 19 St. John's L. Rev. 43 (1944); Note, Local Prejudice in Criminal Cases, 54 Harv. L. Rev. 679, 685-86 (1941). See also Hamm v. City of Rock Hill, 379 U.S. 306 (1964), 26 Ohio St. L.J. 659 (1965).

[38] "Rage to Remove," Time Magazine, Oct. 30, 1964, p. 88.